

## Ukraine updates its Copyright Regulation based on principles of EU law

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**The IT industry in Ukraine remains one of the key drivers of the Ukrainian economy even despite the market turmoil in the times of war. Alongside this, the constant development of technology and the need to honour obligations and commitments to implement EU law in terms of copyright and related rights requires certain amendments to the current Ukrainian legislation.**

On **1 January 2023** the new law "*On Copyright and Related Rights*" ("New Copyright Law") came into force. With this legal update, Ukraine moves forward on copyright and related rights law, not only chasing the EU requirements, but implementing the best market IP practices on improving IP copyright protection and protection of related rights bringing it in line with the EU regulation.

Below are the key changes which are introduced by the New Copyright Law. It widens the legislative provisions in terms of copyright and related rights, which previously lacked proper details, and makes the regulation of certain legal issues in this area more specific.

### **The concept of a *sui generis* right**

The New Copyright Law sets out a list of copyright objects, related rights and works which are not afforded copyright protection under the European Union approach. Among them are: abbreviations, the photographs that lack signs of originality (are not photographic works) and non-original objects generated by a computer program (e.g. AI-generated objects) which are now protected by a unique "*sui generis*" right.

For decades, the *droit d'auteur* system has advocated that only a human creator can be an author, because in order to qualify for copyright protection, a work created must be original to the author and possess some degree of creativity. If these criteria are not met, an object cannot be protected by copyright, so moral and economic rights do not exist either. With the latter, it basically means that these works may still fall under copyright protection, but in a unique way: there are no moral rights arising out of creating a non-original object, as no individual was involved in its development. But apart from this, some parties may be entitled to exercise some scope of economic rights with respect to machine-generated objects.

### **Orphan works and other important takeaways**

To facilitate digitalisation, a legal framework on the specifics of exploitation of works that have acquired the "orphan" status has been established (the orphan works are the works that are still protected by copyright, but their authors or other rightholders are not known or cannot be located). With the adoption of the New Copyright Law the IP registers are to be created for certain types of IP objects, in particular for orphan works. The exploitation right is

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granted to libraries, museums with open access to visitors, archives and other organisations for the preservation of funds.

A new approach has been also adopted for the calculation of the copyright protection validity term: from now on, as in EU countries, copyright protects intellectual property objects for 70 years after the author's death or 70 years after the death of the last surviving author in the case of a work of joint authorship.

The New Copyright Law has also broadened the scope of the moral rights of the author. From now on, the author has been granted a right to name the work or leave it untitled, as well as the right to dedicate the work to a person, event or date.

## Violations

In addition, the New Copyright Law covers actions which are considered as those that violate copyright and related rights. Among the violations, there is now an import, distribution of copies of copyright and (or) of related rights objects, from which the economic rights to these objects have been removed or changed without the permission of the rightholder, in particular in electronic (digital) form, or forgery, changing or removing information, in particular in electronic (digital) form, rights management without the permission of the relevant rightholder of copyright or related rights. In addition, new guidance has been suggested for actions which are now considered as threatening violation of personal moral and economic copyright and related rights.

The new copyright regulation has also increased the liability for the infringement of intellectual property rights. In particular, methods of calculating compensation with reference to the subsistence level for able-bodied persons have been supplemented - from 2 to 200 subsistence levels (EUR 135 – EUR 13,600 as of 01.01.2023).

## Rights transfer

The contractual provisions on the transfer (alienation) of property rights to objects of copyright or objects of related rights also underwent certain changes. The agreements setting out the transfer of intellectual property rights may now be executed in an electronic form. In addition, it is clearly stated that the economic rights to the object of copyright or the object of related rights can be alienated either to any other person in full in the territory of all states of the world or partially for specific means of exploitation within the territory of certain states of the world, or on all means of exploitation within the territory of certain countries of the world. In the event of the transfer (alienation) of property rights to the intellectual property object or the object of related rights partially, the economic rights in the scope not specified in the contract are considered not to be transferred. Therefore, when entering into agreements on the alienation of proprietary rights or any other agreement envisaging such alienation, *it is still highly important to exactly specify the scope of rights to be transferred.*

However, an old conflict of laws has been resurrected with the change to the law as regards the intellectual property rights to the object created within the scope of the employment agreement and rights to the object created on request/ordered.

Under *Part 2 of Art. 429 of the Civil Code of Ukraine and Art. 440 thereof*, the intellectual property rights to a work created within the scope of the employment agreement belong to the employee who created this work and the company or private entrepreneur who hired this employee, jointly, unless otherwise set out by law or the contract. However, the New Copyright Law, which does not affect the provisions of the Civil Code of Ukraine, transfers economic intellectual property rights entirely to the employer, from the moment the work is created, unless otherwise provided by law, the employment contract or another agreement on the alienation of the IP rights. If the economic rights to a work created within the scope of the employment agreement are transferred in full to the employer, the employee, as an author, is entitled to remuneration.

Another issue is that following the provisions of the Civil Code of Ukraine, intellectual property rights to a work created on request/ordered belong to the creator of this object and the customer jointly, unless otherwise set out by the contract or law. However, the New Copyright Law grants the economic rights to a work created on request/ordered to the customer, unless otherwise agreed in the contract (except for a work of fine art).

The employer's or customer's right to complete the unfinished work by means of hiring another person or to create amendments to it may be considered as one of the key features as regards the works created on request/ordered and the works created within the scope of the employment agreement.

## **Computer programmes**

The New Copyright Law brings more clarity and details regarding the copyright of computer programmes. The originality criterion is becoming more important for the computer programme to enjoy copyright protection, whereas the protection now covers the computer programmes expressed in source or object code subject to their originality. Namely, it is now specified that the graphic interface of a user, the functions set, the format of data files used in a computer programme to operate its functions shall not be deemed as the forms of computer programme expression and therefore are not protected by copyright. It should be mentioned that following the EU approach, the ideas and principles which underlie any element of a computer programme, including those which underlie its interfaces, logical schemes, algorithms and programming languages, remain outside of copyright protection. It basically means that any exploitation, reproduction of these elements of the computer programme shall not be considered as a violation of the author's rights.

## ***Droit de Suit***

The rates of the equitable remuneration for the resale right have been updated pursuant to European law (where the author is awarded with a percentage, a share, of the resale price of an original manuscript of a literary or musical work in the so-called "*droit de suit*" or artist's resale right which is now set at a rate from 0,25% to 6% of the resale price, but shall not exceed EUR 12,500).

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With the new copyright regulation, Ukrainian industries dealing with intellectual property rights actually receive both *an update in terms of terminology and in terms of copyright protection*. Therefore, those companies, primarily involved in the IT business, will now have to **reconsider their agreements executed with software developers** in terms of copyright protection and **update their internal documents** related to copyright.

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